

CPI's Europe Column Presents:

# The Quest for Pro-Competitive Regulation in the EU: Who Cares?

*By Juan Delgado & Héctor Otero  
(Global Economics Group)*



**CPI** COMPETITION POLICY  
INTERNATIONAL

Copyright © 2015

Competition Policy International, Inc. For more information visit [CompetitionPolicyInternational.com](http://CompetitionPolicyInternational.com)

March 2016

The year 2015 has left on the table a number of issues that show the different approach to the promotion of competitive markets in different jurisdictions across Europe. For example, the disruptive entry of [Uber](#) and [other online platform businesses](#) has triggered different reactions in different countries (or even across cities) from entry accommodation to stricter regulation and even to entry banning.

The commitment to competitive markets has been at the core of the European Union (EU) policies. There exists nowadays a general consensus across Europe about the benefits that society obtains from competition. Such commitment has been successfully implemented in the last decades through competition and single market policies. The activity of the European Commission (EC) and the EU Member States in prosecuting anticompetitive practices, especially cartels, controlling mergers and state aid, and removing obstacles to the free movement of goods and services has been particularly intense in the last decades.

However, as shown by the difficulties in implementing the Services Directive and by the diverse reactions to the disruption brought by online platforms in regulated markets, developing competitive markets cannot be limited to prosecuting cartels and abusive conduct, and the efforts to remove obstacles to competition cannot be just focussed on the removal of cross-border barriers. Many barriers to competition are located at home and often hidden behind government-sponsored domestic regulations.

The anticompetitive nature of some regulations often comes as a heritage of the past: some regulations have survived successive waves of liberalization, without having gone through a proper assessment of whether they needed to be amended and whether they were still (or had ever been) necessary. Examples of such regulations include lodging, transport, retailing or professional services regulations. But most worryingly, some new regulations might also contain clauses of anticompetitive nature, which effects might have not been properly balanced. For example, the recent [EU regulation on payment card interchange fees](#) makes market entry almost impossible and perpetuates the current concentrated market structure, which was initially supposed to address.

The objective of better regulation has been permanently in the agenda of international institutions (e.g. the [OECD Competition Assessment Toolkit](#) is widely used), governments and regulators but how can better regulation be effectively implemented? Who should care about competitive regulation in the EU?

### ***One suit does not fit all***

The role of the EC in removing anticompetitive domestic regulations seems to be fading. While the EC made relevant wide-ranging competition reforms in the past through liberalisation directives, standardization and the application of competition law, the pending reforms, which are often country-specific, seem not to be streamlined through further EU-level legislation. Being aware of its limitations, the EC has redirected its efforts in two directions: on the one hand, the EC has opted in a limited number of cases for regulating firms' behaviour rather

than addressing the existing obstacles to competition and, on the other, in some other cases the EC has rightly delegated potential regulatory reforms to Member States.

### ***Cut the roots, not the fruits***

The recent EU interventions in the payments market, regulating the interchange fees; in telecoms, [regulating the roaming prices](#); and the recent [public consultation on geo-blocking](#) are examples of attempts to regulate firms' behaviour. Such policy interventions are of "palliative nature", addressing the effects of the lack of competition but not its causes. Such interventions do not trigger any change in the market dynamics nor in the industry structure and run the risk of creating a context where the current market structure is perpetuated and so the need for such palliative regulation. In that respect, palliative interventions do not promote competition and their use should be exceptional.

### ***Go local!***

An example of the delegation of reforms to Member States is illustrated by the recent [EC Single Market Roadmap](#), released in October 2015. The Single Market Roadmap proposes a number of pro-competitive reforms in a wide variety of sectors such as the retail sector, public procurement and professional services. The EC rightly directs the responsibility to reform to Member States, acknowledging the country-specific nature of most of the remaining obstacles to competition and the limitations of EU-level policy instruments to tackle such obstacles.

Leaving this duty to national governments and legislators has its own limitations though. National governments and legislators might have multiple interests other than promoting competitive markets, such as industrial policy or job creation objectives. In the process of meeting such objectives, they might decide to sacrifice the aim of competitive markets.

In order to align governments and legislators incentives with welfare maximising objectives, the appropriate instruments have to be put in place. The lack of incentives by governments to design procompetitive regulation can be resolved in different ways: [Some argue for a direct application of article 106 TFEU by national courts and national competition authorities](#). But the use of non-elected bodies to overturn legislation can be perceived as an act against the democratically elected parliaments sovereignty and thus be counter-productive if citizens are not fully aware of the benefits from competition.

Softer alternatives imply increasing governments' accountability of their decisions vis-a-vis independent agencies (such as policy evaluation offices and competition authorities) and vis-a-vis stakeholders in general through public consultation mechanisms; and increasing citizens' awareness about the benefits derived from competitive markets.

### ***Competition authorities, get the power!***

Empowering competition authorities to assess the pro-competitive nature of existing and new regulations seems a better alternative than granting that job to general policy evaluation offices, given their expertise in assessing restrictions to competition. Many EU competition

authorities have already powers to review and issue opinions on new regulations. However, in most cases, there are limitations that constrain how such opinions can influence the final outcome. Competition Authorities often also have the power to launch market investigations to assess the obstacles to competition in specific industries (see for example, the recent market investigation by the [UK CMA on retail banking](#)) but their powers to implement the recommendations derived from such market investigations also differ widely.

Just in over half of the EU Member States, such as in France, Spain and Belgium, governments are requested by law to obtain opinions from the national competition authorities on the potential obstacles to competition posed by new regulations. But this does not guarantee that such recommendations will be adopted by legislators. Also, if the authorities' opinion arrives too late in the legislative process, legislators are less likely to follow the authorities' advice.

The binding or advisory nature of such opinions differs across countries: Binding opinions are rare and only exist in Romania. Binding recommendations can create legitimization problems, as discussed above. In other jurisdictions, such as Spain, opinions are not binding but they are publicly available in the competition agency webpages. Publicity might force legislators to justify why they did not follow the authority's advice. Finally, in some other jurisdictions such as Italy and Denmark, governments have the obligation to respond to the competition concerns posed by the competition authorities, especially when they are not incorporated in the new regulation. Forcing governments to respond can limit their ability to ignore the authorities' recommendations.

Regarding market investigations, many authorities have the power to initiate ex-officio investigations that end up in policy recommendations. However, the status of such recommendations varies. In some cases (such as the Spanish CNMC, the Irish CCPC and the German Bundeskartellamt), the recommendations are not binding and cannot be enforced by the authorities; while in others, such as the UK CMA, the agency can propose and enforce remedies (perhaps the [BAA Airports](#) case is the most prominent case in this respect.).

### ***Ask (the right questions to the right people)!***

An alternative way to increase governments' accountability and citizens' awareness is by means of public consultations of regulatory initiatives. Through public consultations, stakeholders can publicly express their concerns and legislators and regulators can feel obliged to respond to them. The transparent participation of stakeholders in the making of a regulation guarantees that all the issues at stake are being taken into consideration and that competition concerns are incorporated into the regulatory process.

The current use and nature of public consultations differs widely across EU Member States. Some countries, such as Sweden and United Kingdom, launch public consultations for practically every regulatory initiative, while others (such as Italy and Belgium) make a very limited use of this instrument.

It is increasingly common that competition authorities and regulators use public consultations in their market investigations. For example, the European Commission opened in 2015 several public consultations including consultations on [geo-blocking of online sales](#) and on [competition by online platforms](#). Making public the stakeholders' contributions to the public consultations and making explicit how the stakeholders' opinions have affected the text of the respective regulations are essential for the effectiveness of the mechanism.

The use of public consultations is however not absent of problems. First, public consultations should be carefully designed to guarantee the gathering of the appropriate data, as highlighted in a recent [CPI Europe column regarding the online platforms consultation](#). Second, more powerful agents are always better positioned to defend their interests in a public consultation than, for example, plain consumers. The participation of consumers might be low and their concerns more diluted than companies' concerns. Governments should work on increasing the legitimization of consumer organizations to increase the role of consumers in public consultations. This potential bias should be specially considered by the consulting entity when designing and interpreting the results of the consultation. Finally, a public consultation can be useless if it triggers a large amount of responses, which cannot be processed in a meaningful way by the consulting entity and, therefore, it will not meet its ultimate aim. Public consultations must be limited in scope in order not to trigger a large number of responses by non-genuine stakeholders.

### ***Conclusions***

The removal of obstacles to competition, especially in highly regulated markets, and the design of procompetitive regulations in response to new market dynamics are essential to mobilize resources and unlock the potential of Europe's economy. The lack of appropriate policy tools by European institutions and the lack of incentives by national governments, often dominated by vested interests, might prevent the further development of competitive markets in the EU. Increasing governments accountability and consumer awareness on the benefits from competition are ways to make progress in this direction. The empowering of competition authorities to conduct market investigations and to supervise ex-ante the impact of regulations on competition; and the wider use of properly designed public consultation mechanisms provide incentives to governments and legislators to incorporate competition concerns in the regulatory process.

Deepening the EU Single Market in the 21st century means attacking the roots of the obstacles to competition that are often hidden behind domestic regulations. There is a need for well-designed policy instruments that create incentives for domestic governments to remove such obstacles and to design procompetitive regulation. There are no shortcuts. A palliative approach controls the pain but does not treat the illness.